MARRIAGE in SOCIETY STATED;

WITH

Some Conſiderations on GOVERNMENT, the different Kinds of CIVIL LAWS, and their diſtinct Obligation in CONSCIENCE.

IN

A SECOND LETTER

TO

The Reverend Dr. *STEBBING*,

Occaſioned by his *Review*, &c.

MUSEUM BRITANNICUM

By JAMES TUNSTALL, D. D.

Rector of *Great Charte* in *Kent*.

LONDON,
Printed for JAMES and JOHN RIVINGTON,
in St. *Paul's Church Yard*.
MDCCLV.
[Price One Shilling.]

MARRIAGE in SOCIETY

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Some Considerations on GOVERNMENT,
the different Kinds of CIVIL LAWS, and
their differing Obligation in Conscience:

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A SECOND LETTER

MVSEVM
BRITAN
NICVM

To the Reverend [illegible]

By JAMES TUNSTALL, D.D.

[illegible]

MARRIAGE in SOCIETY STATED, &c.

SIR,

THERE being no Means more likely to attain the only juſtifiable End of controverſial Writing, namely, the Conviction of the Party in Error and the Eſtabliſhment of the Truth, than a careful Separation of the Points in Diſpute from thoſe which are agreed on, and contended for, on both Sides; in my former Letter to you, I conſidered diſtinctly, in the firſt Place, the Power of States, or the Efficacy and Obligation of Civil Laws, in the Concern of Marriage in general: And then I made the Application to the particular Caſe of the Marriages of Minors. Your Conduct in your late *Diſſertation*, which determined me to the

Uſe of that Method, I find to be ſtill the ſame throughout your *Review*, in which your *Principles*, upon the Subject of Marriage and the Marriage-act, have at length *received* their final Reformation and *Perfection* *. The frequent and expreſs Declarations, made in both thoſe Performances, would naturally induce one to think, that the ſingle Point now remaining in Diſpute between you and your Adverſaries is, whether States have the Power of annulling *the Marriages of Minors* †. But to ſtrengthen your Oppoſition to the affirmative Side of the Queſtion, you endeavour every where to embarras it with all thoſe Difficulties and Objections, which tend to take from States the Power, acknowledged and even contended for by yourſelf ‡, of granting to Marriage any legal Eſtabliſhment enforced with the Sanction of abſolute Nullity. Now

* Pref. p. ii.

† *The Queſtion* is, whether a Marriage Contract, made by Perſons [Minors] to whom the Law has forbidden the Uſe of Marriage, is void. *Rev.* p. 8. See *Diſſ.* Pref. p. ii.

‡ If I was of Opinion, that Laws had ſuch a Power as this [of ſuſpending the Minor's Right to the Uſe of Marriage] I ſhould not diſpute, *whether they could annul Marriages*. *Rev.* Ib. See *Diſſ.* p. 39, 40.

whether

whether all this Appearance of Contrariety in your Opinion is to be imputed to any Want in myſelf of a juſt Diſcernment of Conſequences, or rather to the accuſtomed Diſguiſes of the Art and Myſtery of School-Polemics; I am perſuaded, it will be found, upon due Conſideration, to be univerſally true, that the very ſame Principles of Morality and Government will vindicate and maintain, and the very ſame extraordinary Caſes and Circumſtances of Neceſſity in the contracting Parties will ſuſpend and ſuperſede, the Force and Operation in Conſcience of all human Appointments, to reſtrain or annul, indifferently, *the unlawful Marriages of Minors, and every other Species of clandeſtine Marriages.*

To begin with your general Doctrine concerning Marriage. *Marriage*, you ſay *, *is ſimply and ſolely the mutual Conſent of the Parties; which is in its own Nature binding upon Conſcience. The Intervention of Society neither adds to this Obligation, nor can diminiſh from it; but directs the Form and Manner of making the Contract; ſo as to draw it under civil Cognizance. With a View to this Diſtinction, Marriage, as it ſubſiſts in Society, may be called a mixed thing; partly*

* *Rev.* p. 36, 7.

civil, and partly religious: Religious, with reſpect to the Contract, as binding in Conſcience; and Civil, with reſpect to the outward Forms, by which Marriage lays claim to Civil Protection. But theſe two Things muſt always be kept ſeparate in our Ideas, and each Effect refered to its proper Principle: the Neglect of which has created great Confuſion in treating upon this Subject; whilſt the Obligation in Conſcience is transfered from the Contract, to which it properly belongs, to the Uſe of the public Forms, with which it has nothing to do. This is the ſame Thing, as if you ſhould transfer the Claim of Civil Privileges from the public Forms to the ſimple Contract, which, every one will agree, is a great Abſurdity.—I have given here the whole of your Repreſentation of the Matter, to which I am oppoſing another Repreſentation, agreeably to my own Principles; in order to ſupply the Deficiencies of the former, and to correct its Miſtakes.

Marriage then, *out of Society*, is ſimply and ſolely the mutual Conſent of the Parties *to conjugal Cohabitation* *. It is the Conſent of

* In the Words of the excellent Biſhop *Fleetwood's* Definition, which the Doctor has approved, Marriage is *the Conſent of a Male and Female at Age to conſent, and* AT

Parties

Parties *both naturally and morally capable* of giving it to each other, or of making the Contract. They are *morally capable* of giving the Conſent to each other, when they are capable of giving it *conſiſtently with every Law*, which can, in this Reſpect, juſtly challenge their Obedience. The Parties, *out of Society*, *muſt* be ſubject to the Law of Nature; and they *may* be farther ſubject to the expreſs Law of GOD: And, when they can, *conſiſtently with theſe Laws*, give a mutual Conſent *to conjugal Cohabitation*; ſuch their Conſent is, in its own Nature, binding upon Conſcience. But the Intervention of Society, or rather of the *Law* of Society, *can* both *add* to this Obligation and *diminiſh* from it; or *totally preclude* it. For there is an unqueſtionable, I preſume, an unqueſtioned † Power of Society

LIBERTY *to conſent, to give to each other the Uſe and Dominion of each other's Body, excluſive to all the World beſides*, &c. Diſſ. p. 42.——This is obſerved, becauſe the Doctor aſſerts, (*Rev.* p. 39.) that *he that contracts Marriage privately, is bound by* THE LAW OF MARRIAGE, *but he is not* ENTITLED *to Cohabitation.* A Contradiction in Terms! Cum regulariter uxor in continuam cum marito cohabitationem conſentiat, &c. *Puff. de jur. Nat.* vi. 1. 22.

† *Diſſ.* p. 39. Quin leges civiles contractui matrimoniali certa quædam capita poſſint ſuperaddere, quibus deficientibus *idem* IN CIVITATE *invalidum et nullum habeatur*, aut

to

to direct the Form and Manner of making the Marriage Contract, ſo as to conſtitute them *abſolutely neceſſary* to the Validity of the Contract, or under the pain of Nullity. Marriage then, as it ſubſiſts in *a Society thus directing the Form and Manner of contracting it*, is a *mixed* Concern; each Party in the Marriage being, of Neceſſity, to be conſidered not otherwiſe than as a *mixed* Perſon. He is not to be conſidered ſimply and ſolely as a *Man*, or as a *Chriſtian* Man; but he is to be conſidered as *a Subject*, or a private Member of the Civil Community. Hence he is bound *Naturaliter*, as a *Man*; by the Obligation of mutual Conſent, according to the Law of *Nature*: And he is moreover bound * *Civili-*

certis effectibus deſtituatur, apertum eſt. *Puff. de jure Nat.* viii. 1. 3. Here *in civitate* means *In the State of Civil Society*, in Contradiſtinction to *the State of Nature*. So the ſame Author; Nullas habebit vires jurata promiſſio de re, quæ eſt illicita jure naturali et divino, imo *humano* quoque iſti non adverſo, ſi jurans in *civitate vivat*. Ib. iv. 2. 9.

*—Ut—matrimonium *civiliter* pro nullo habeatur, et reſcindi queat. *Puff. de jure Nat.* vi. 2. 14. Wherefore our Author ſhould conſtrue the Word *civiliter*, *in Civil Eſtimation*, and not *by the Civil Authority*, I cannot comprehend. *Obſervations*, &c. p. 14. *Civiliter* never ſignifies *by the Civil Authority*; but *Civilly*, or *in ſome Civil Reſpect*. *Rev.* p. 16. *Civilis* obligatio aliquando notat talem, quæ

ter

ter, as a *Subject*; by the Obligation of Allegiance to the Civil State, according to the Law of Society. Now the Operation of the Law of Society is diſtinguiſhable in two very different Effects. The one Effect is the Subject's *Obligation* in *Conſcience*, anſwerable to the *Power*, or *rightful Authority* of thoſe who preſide over Civil Communities; the other Effect is *Civil Cognizance* or *Juriſdiction*, anſwerable to the *penal Enforcement* of their Laws *. Accordingly Laws appointing the requiſite Solemnities of Marriage produce this

non in mero jure naturali fundatur, ſed ex *jure civili* oritur; — aliquando notat talem, — ex qua etiam *actio in foro civili* oritur. *Puff.* Ib. iii. 4. 5. *Civiliter* quoque obligari ex actu ſuo dici quis poteſt, aut eo ſenſu, ut obligatio procedat, non ex mero jure naturali, ſed *ex jure civili*, vel ex utroque; aut eo ſenſu ut *in foro actio inde detur*. *Grot. de jure*, &c. ii. 14. 6. 2. See the preceding Note.

* Præſupponimus, ut imperium effectu ſuo potiatur, requiri tum *vires naturales*, qua [quibus] ſubjectus—*repræſentato aliquo malo* poſſit *cogi*; tum *titulum*, ex quo jure aliis præſtandum quid aut omittendum queat *injungi*; cui in iſtis *reſpondet obligatio ejuſdem juſſis obſequendi*. *Puff.* &c. vii. 3. 1. Etſi primario obligationis *naturalis* ſit *conſcientiam hominis ſtringere*; *eadem* tamen *efficacia* obligationi quoque *civili* communicatur.—Deinde in hoc *utraque* obligatio convenit, quod homo ultro et ex *intrinſeco* velut *motu debeat implere* ea, ad quæ per illam tenetur. In quo præcipue *obligatio* a *coactione* differt. Ib. iii.4. 6.

double Effect. They create a new Obligation in Conſcience conſpiring with the Obligation, which ariſes to the Parties *naturally* from their mutual Conſent; and they conſtitute a Juriſdiction over Marriage, *drawing it*, as you obſerve, *under Civil Cognizance*, or entitling it to *Civil Protection*. But it muſt be *the Conſiſtency* and friendly Agreement alone of *the two Obligations in Conſcience*, that can ordinarily produce their genuine and perfect Offspring; MARRIAGE IN SOCIETY. It is contrary to the *Nature of Man*, that there ſhould be Marriage without the mutual Conſent of the Parties; and it is contrary to the *eſſential Order of Society*, that there ſhould be Marriage *of its Subjects*, which its rightful Laws do wholly diſallow, or declare to be *abſolutely null and void:* And where the Obligation in Conſcience, which *otherwiſe would be created* by the mutual Conſent of the Parties, does *irreconcileably interfere* with the Obligation in Conſcience ariſing from the juſt Authority of the Civil Legiſlature; there the latter Obligation muſt prevail to invalidate and extinguiſh the Obligation in Conſcience of a Marriage Contract; as it certainly does and muſt prevail to invalidate and extinguiſh the *interfering* Obligation in Conſcience of all poſitive

poſitive Acts and Contracts whatſoever, between Parties in lawful Subjection to the Civil Community*. So that, upon the whole, where the Solemnities of Marriage are publicly preſcribed *with the Sanction of Nullity*, there is no *transfering of the Obligation in Conſcience from the Contract to the Uſe of the public Forms*. For there is, in reality, a prior, a ſuperior *Obligation in Conſcience to the Uſe of the public Forms*; not indeed an Obligation founded in the intrinſic Nature of the Forms themſelves, which may be *indifferent* in *moral* Quality, though not in their *Uſe* and Importance to Society, as to their Matter or Circumſtances; but an Obligation derived to them from the inherent and indiſpenſable Authority of the Civil State, to which Subjects, by the Law of their Allegiance, are obliged to render an active Obedience, in its ſalutary Appointments of the requiſite Solemnities of Marriage †. I have, in a Manner,

* Poſtquam—quis ſummum imperium civile jam ſubiit, nullo modo poteſt *alteri poteſtatis quid in ſe concedere, quod adverſus jus ſummo imperio quæſitum valeat*; cum hac ratione duos dominos non ſubordinatos acciperet, quibus ſimul quis ſervire nequit. *Puff.* &c. iii. 2. 9.

† Obſervandum, uti leges civiles alios quoque contractus certis ſolennibus ac ritibus veſtire ſolent, qui, ubi abfuerint, iidem in foro civili pro invalidis cenſentur; ita et

tranſcribed theſe laſt Sentiments from *Puffendorf*, who here *reſolves*, as you expreſly declare, *the Obligation of the Subject, to comply with* the eſtabliſhed Solemnities of Marriage, *into that general Obligation* [in *Conſcience*, I preſume, as it is an Obligation derived from *the Law of Nature*, *] *which all Subjects lie under to obſerve the Laws of their Country* †. And unleſs you will maintain, that there may be *Obligations in Conſcience*, at the very ſame Time, carrying Subjects quite contrary Ways; muſt not the *general Obligation* to comply with thoſe Solemnities, which *the Laws of their Country* have made *neceſſary* to Marriage, directly infer *a Defect, as to the Validity of* a clandeſtine Contract of Marriage *in foro Conſcientiæ?*

Thus I have placed, as it were in Contraſt, our general *Principles* upon an intereſting Part

matrimonio talia quædam, in civitatibus nonnullis, deprehendi adjuncta, ut, ſi illa abfuerint, pro legitimo idem non habeatur, aut ſaltem quibuſdam effectibus in foro civili careat. Illa ſolennia etſi a jure naturali ignorentur; tamen cum *idem jus leges civiles obſervari jubeat ab illis, qui iiſdem ſubjiciuntur*; indifferentiam juris naturalis heic nequicquam allegant qui poteſtatem ferendi aut abrogandi leges civiles non habent. *Puff.* &c. vi. 1. in fin.

* The *jus naturæ*—is the Law of *Conſcience*. *Rev.* p. 21.

† *Ib.* p. 39.

of

of the Controverſy, *viz.* "Whether a Mar-
" riage Contract, annulled by the Civil Au-
" thority, is void in Conſcience, as well as in
" Law." The annulling Law, you affirm *, HAS *not ſaid, nor indeed* COULD *it ſay, that the Nullity ſhall reach to Conſcience; though ſome of its Defenders have.* In the number of theſe *Defenders* I profeſs myſelf to be; and that upon the following Principles, which I lay down in Diſproof of both the Members of your Aſſertion; *viz.*

Firſt, Becauſe Society has a rightful Power over Marriage, and *can* reſtrain in Subjects the Uſe of their natural Right of contracting it; whence the Contract will, *in certain Caſes*, be null and void in its *Principle.*

Secondly, Becauſe Society has a rightful Power over ſome of the Rights or Obligations *eſſential* to a Marriage Contract; and therefore *can*, in certain Caſes, *viciate* the Contract in its *Effects:* And,

Thirdly, Becauſe *the Intention* of Society, to exert both theſe Acts of its rightful Power, *is declared*, under ſuitable Circumſtances, by its legal Eſtabliſhment of Marriage *with the Sanction of abſolute Nullity.*

Firſt, Society has a rightful Power over Marriage. The public Regulations of Mar-

* *Ib.* p. 48.

riage, as well as the judicial Cognizance ariſing from the penal Enforcement of thoſe Regulations, are confeſſedly within the Province of the Civil Legiſlature. Now the Meaſure of Civil Subjection does exactly tally with the Extent of the Magiſtrate's Right; and a Compliance with the Conditions, under which the Marriage Contract in Society is regulated, according to the declared Intention of the Civil Legiſlature, is an indiſpenſable Article of the Subject's Allegiance. Hence a Marriage Contract, which is manifeſtly diſallowed by the Laws of any Civil Community, is null and void in itſelf; being made by Parties *non ſui Juris* in that particular Caſe, or being deficient in the *Principle* eſſential to every obligatory Act or Contract; *the Right* of contracting the Obligation intended by it. Morals admit not, that an Obligation to a *third* Perſon be contracted in Prejudice of any *prior* Right; let that Right be veſted either in a private or a public Perſon, that is, the Community. Here the Right of Society is *prior in Time*, to every Obligation contracted by the *poſitive* Will of the Subject; for he is *a Subject* previouſly to his exerting any Act of Will whatſoever. And the Right of Society is *prior in Dignity* to every human Right, as the Relation of Society is the moſt eſtimable and eſſen-

tial

tial to the Nature and Condition of Man. I have hardly advanced one Poſition on this Head, which is not ſupported by the Authority of the beſt Maſters in the moral Science *. I may add the Authority of yourſelf, who aſſert what will juſtify the whole, that *the Law may in many Caſes take away the Right to contract; and then the Contract is void of itſelf* †. But,

Secondly, This Efficacy of the Law *to take away*, in certain Caſes, *the Right to contract*, will more eaſily proceed in the Concern of a Marriage Contract; " becauſe Society has

* Conjunctio maris cum fœmina, per quam propagatur genus humanum, digniſſima res eſt *legum cura*. Grot. *de Ver. Rel. Chriſt.* ii. 13. Nos examuſſim *ſibi invicem reſpondere* aſſerimus *poteſtatem regis legitimam* et *officium civium*; adeoque pernegamus a rege *jure* quid poſſe imperari, quod ſubjectus *jure* poſſit detrectare. *Puff.* &c. vii. 2. 11. Ubi juratum fuit ſuper rebus et actionibus, *quæ directioni ſuperioris ſubſunt*, juramentum a *conſenſu* — ſuperioris *vim mutuabitur*, qui illud irritum declarare poteſt. Hinc lege Hebræorum, *Num.* xxx. Pater poterat reſcindere vota jurata filiæfamilias, maritus uxoris, dominus ſervi, ſi videretur. Ib. iv. 2. 24. Nec ſuper rebus meis aut actionibus, *in quas jam alteri jus fuit quæſitum, tertio* valide poſſum promittere.—Illud tritum, *qui prior tempore, potior jure*, &c. Ib. iii. 7. 11. In examinando jure naturæ primum videndum, quid illis *naturæ initiis* congruat; deinde veniendum ad illud, quod, quanquam poſt oritur, *dignius tamen eſt*, [i. e. recta ratio et natura ſocietatis.] *Grot. de jure*, &c. i. 2.

† *Rev.* p. 35.

" a right-

" a rightful Power over ſome of the Rights " or Obligations eſſential to that Species of Con- " tract; and therefore can in certain Caſes, *vici-* " *ate* the Contract in its *Effects*."

This is your expreſs Doctrine. *He that contracts Marriage privately, is bound by the Law of Marriage, but he is not entitled to Cohabitation; which (till he has complied with the public Forms,* i. e. made *neceſſary* to Marriage) *will be vicious even under the Seal of Marriage* *. The Title then to conjugal *Cohabitation* is confeſſedly in the Power of the Law. A Conceſſion ample enough to ſhew the Nothingneſs of a Diſtinction, which would ſeparate the *Contract* of Marriage, from the *eſſential Attribute* of Marriage! For what does that Diſtinction amount to? Why, to this weighty Poſition, neither more nor leſs; " That Subjects " may make a private Contract about ſome " Buſineſs or other; but, where the Law diſ- " allows, they cannot make a *Marriage Con-* " *tract* †." Now we may, by the by, ob-

* *Rev.* p. 39.

† V ſupra Not. ad p. 4. Ut aliqua proprie *alterius uxor* dici *queat*, *neceſſum* videtur ita ipſam velut in manus viri conveniſſe, ut *ea tanquam uxore poſſit uti*. Puff. &c. vi. 1.14. It is remarkable, that the Doctor formerly ſeemed to think *actual Conſummation* to be neceſſary to the Contract of Marriage; (*Enquiry*, p. 6.) now he will not allow even the *Right* to it to be neceſſary.

ſerve, that there being an allowed *Viciouſneſs* of Cohabitation, that is, an *Unlawfulneſs* of it *in Conſcience, under the Seal of* what you call a *private Marriage*; wherever *Puffendorf* aſſerts to Civil Laws, the Power of declaring Marriages *abſolutely invalid* or *null*, he muſt mean *invalid* or *null* with reſpect to their *internal* Obligation, as well as with Reſpect to their Privileges or Effects *in foro externo* *. *Puffendorf* expreſly pronounces it *an Abſurdity*, that any *vinculum pacti* ſhould ſubſiſt, when no Part of the Obligation ariſing from the Contract either can or *ought to be* diſcharged †. He goes farther ſtill: He pronounces it no leſs than a *Violation of the Law*

* Quarum — legum ea vis eſſe poteſt, ut quod contra eaſdem contrahitur connubium, certis effectibus, per jus civile aſſignatis, deſtituatur; vel etiam omnino pro invalido, et *quod reſciſſionem admittat*, declaretur. *Puff.* &c. vi. 1. 8. *Declaretur*; ut ſupra, *dici queat*, i. e. *ſit*. The ſame may be obſerved of the Words, *pro nullo habeatur*, cited p. 6. though the Doctor will have them to ſignify, *not that* the Marriage IS *nothing, but that it ſhall be* RECKONED, ESTEEMED *or* ACCOUNTED *as nothing*. *Rev.* p. 17. Equally good Criticiſm and Law! For pray how can a Marriage *admit of Reſciſſion*, or be juſtly *reckoned as nothing?* Why, he will tell you, (*Enq.* p. 21. Not. *) that *in the Caſe of Unfaithfulneſs to the Marriage Bed, the Contract voids itſelf; the Law only declares it void*, i. e. the Contract muſt be void by the Force of Law, before a judicial Sentence can properly *declare* it ſo.

† Abſurdum—eſt dicere, *vinculum pacti* adhuc ſubſiſtit; et tamen nulla pars ejus debiti, quod ex eo pacto fluit, præſtari poteſt, aut *debet*. Puff. &c. vi. 1. 22.

of

of Nature, for the Cruelty and intolerable Diſpoſitions of the Parties, to make a Separation of them from *Bed and Board*; *the Marriage Obligation in Conſcience ſo remaining, that they cannot marry again* *. He ſpeaks indeed of an *abſolute* Separation; and makes a reaſonable Conceſſion in Favour of a *temporary* one, for the moral Uſes of Diſcipline, Correction, and Puniſhment. But let it be remembered, that I am only repreſenting *Puffendorf's* Opinion, both as to the ſpecial and juſtifiable *Cauſes* of Divorce, and as to the *Extent* of a Divorce from the Bond of Matrimony *once in actual Exiſtence*. He is plainly no Friend, no more than you are when it ſuits your Occaſions, to the Deciſions of the Canoniſts diſtinguiſhing the *civil* from the *moral* Operations of ſuch Divorce †; that is,

* Juri naturali repugnat, ob mores intolerabiles et nimiam ſævitiam conjuges ſeparare a conſortio *menſæ thorique, ſalvo* tamen *vinculo matrimonii*, quo de aliâ conditione ſibi proſpicere prohibeantur; niſi forte *ad tempus*, et in *vicem caſtigationis* ea ſeparatio ſit injuncta. *Ib.*

†—Ut non ſolum læſa pars cum perfida conjuge non amplius teneatur cohabitare, ſed et læſæ parti *tranſire ad ſecunda vota liceat*; quicquid in contrarium *jus Canonicum nugetur*. Puff. Ib. c. 21. In the Caſe of Unfaithfulneſs to the Marriage Bed, the innocent Party lies under great Hardſhips: But what is it that precludes him from the lawful Remedy? Why, *the civil Laws of ſome Nations*. —The Author takes it for granted, that *our* Laws are right.

he

he is plainly no Friend to your favourite Diſtinction of *Obligation in Conſcience*, and *Nullity in Law*, of a Marriage, which a ſtanding Conſtitution of the State has declared *ipſo facto* null, or which ſhall be *reſcinded*, purſuant to a legal Conſtitution, by the regular Sentence of an authorized Judicature.

To return to the Argument. We are agreed, that the conjugal Cohabitation, in conſequence of a Marriage publickly diſallowed *, has a moral *Viciouſneſs* perpetually attending it; that it is *a Contempt of the* rightful *Laws of Society*, and *an Offence to God*, being *one Species of that unlawful Commerce, which the Scripture calls*

But, perhaps, I might *more reaſonably* bring my Principle as an Objection to theſe Laws. *Rev.* p. 27.

* Should it be ſaid, that conjugal Cohabitation needs not to be, *in Fact*, the Conſequence of the Contract: I anſwer, that the *Right* to it in the Parties being implied in a real Contract, the Doctor's Hypotheſis introduces *contradictory* Rights; the Right of the private Parties, on the one hand, and the Right of the Public, on the other, to the ſame individual Thing at the ſame Inſtant of Time. See *Vindicat.* p. 20. Farther; though the clandeſtine Contract be a *mere Nullity*, yet the very *Attempt*, or *Act* of ſuch Contract is *injurious* to Society, and therefore *puniſhable* by it. Si actus, qui lege aut præcepto interdictus erat, et *valere vetitus*, interdici æquo jure potuit, jam *irritus* erit actus privati; ſed *puniri* tamen idem poterit, ideo quod promiſit id quod *ſui juris non erat*, maxime ſi *juratus* id fecerit. *Grot. de jur.* &c. iii. 23. 5. 4.

Fornication †. Now ſuch a *Viciouſneſs* of *Effect*, as long as it continues, does utterly invalidate every moral Act or Contract whatſoever. For it is impoſſible, that any Perſon, in any Caſe whatſoever, ſhould be placed, by his own or any other's Act, under a moral Obligation to commit Sin. The Viciouſneſs of Effect may ſometimes have the formal Nature of *Injury* againſt the *Right* of a third Perſon; and then it annihilates the Obligation ariſing from any moral Act, or, in other Words, the Act will be *ipſo facto* null, as has been already ſaid, through Defect in its *Principle*, the rightful Power of the Agent or contracting Party. And ſuch is the real Caſe of the *Effect* of an unlawful Marriage Contract; ſince conjugal Cohabitation, in conſequence of that Contract, is againſt the acknowledged *Right* of Society. But that a Viciouſneſs of Effect ſhould annihilate the Obligation ariſing from any moral Act, it is not neceſſary, that the Effect ſhould carry with it the Idea of *Injury*; provided it carries with it the Idea of *Sin*, which indeed is Injury againſt God. Thus the famous *Corban* of the JewiſhCaſuiſts, a ſolemn Vow *never to perform, for the Time to come*, the Offices of Liberality or the Returns of Gratitude to a neceſſitous Parent, has

† *Enq.* p. 22.

a *Sin-*

a *Sinfulneſs* of Effect perpetually attending it, and is *ipſo facto* null *; though the Parent *has*, in Strictneſs, NO RIGHT *to the Child's Eſtate* †. A ſinful Act may, for Reaſons both politic and juſt ‡, derive upon the Agent an Obligation, not only to the ſuffering of Puniſhment, but to the transfering of his Right; but as God has *given to no Man a Licence to Sin*, ſo he has given to no Man a Licence to *oblige* himſelf to the Commiſſion of Sin; which would be the ready Way to deſtroy all moral Obligation, by making it to depend upon the precarious and corrupt Determinations of the human Will.

I will here preſume to offer one Remark upon a celebrated Paſſage of that eminent Scholar and Caſuiſt, Biſhop *Stillingfleet*. —" Matrimony," ſays he §, " being a Con-" tract of a Civil and Public Nature, it is very " juſt and fitting, that the Civil Society and

* Matt. xv. 5.---Peccat quidem qui *illicita* promittit, ſed *bis* peccat qui eadem *præſtat*. *Puff.* &c. iii. 7. 6.

† *Diſſ.* p. 17.

‡ Sæpe enim indecentia eſt major in actu quam in effectibus: ſæpe etiam incommoda, quæ reſciſſionem ſequuntur, majora quam ipſa indecentia, aut incommodum actus ipſius. *Grot. de jure*, &c. ii. 5. 16. 2. So it is generally better, that Prodigality ſhould ſometimes diſſipate an Eſtate, than that imprudent Perſons ſhould be reſtrained from the Diſpoſal of their own.

§ *Miſc. Diſc.* p. 73.

" the Chriſtian Church ſhould appoint Rules " and Orders for the decent Performance of " it, and may appoint Penalties to the Breakers " of thoſe Rules; ſo far as to illegitimate the " Children born of ſuch Marriages, which is " nulling the Contract as to the Civil Effect of " it. But I do not ſee how Church or State " can null the Contract *as to Conſcience*, ſo as " to make it lawful for ſuch Perſons to marry " others."—The Obligation in Conſcience of a *Chriſtian* Marriage Contract, in actual Exiſtence conſiſtently with every Law human and divine, cannot be nulled by an occaſional Interpoſition of Law *; any more than the Obligation of a Subject's Oath, touching a Matter independent on the Power of the Civil Legiſlature †. But as the late Marriage Act did not null, nor ever intend to null, the exiſting Obligation in Conſcience of any Marriage Contract, or even Precontract of Marriage, throughout *England*; ſo the Biſhop's Deciſion, if capable of an Application to your Purpoſe, la-

* Can a Contract *lawfully made* be diſſolved by Law? I ſay it cannot. *Rev.* p. 35. So ſay I too (except where the Marriage Contract *has voided itſelf*) and almoſt every Body elſe. But what is that to the Purpoſe?

† Apparet—juramentum, quod in ſe nullo laborat vitio, factumque fuit *ſuper re, de qua in jurantis arbitrio eſt pro lubitu diſponere*, a ſuperiore non poſſe reſcindi. *Puff.* &c. iv. 2. 24.

bours under two eſſential Defects. Firſt, the Queſtion is, not whether the Civil Society can null, as to Conſcience, a Marriage Contract actually made and ſubſiſting in due Force; but whether it can *appoint* public *Rules and Orders as neceſſary to the original making* of the Contract; and conſequently, whether it can render the Act of contracting, in Defiance of thoſe *Rules*, wholly ineffectual in Law and in Conſcience, through the Defect of its *efficient Cauſe*, the *Right* of the Parties. — Secondly, the Civil Society not only can *appoint* Civil *Penalties to the Breakers of the Rules*, ſuch as *Illegitimacy of Children*, &c. but it can withhold a Right, or countermand an Obligation *eſſential to the Marriage Contract*; and therefore render the Contract wholly ineffectual through the Viciouſneſs of its Effect.

The remaining Inquiry is, how it may be ſufficiently known to the Subject, that the Civil Society does actually *intend* to exert both theſe Acts of its rightful Power (the Act of reſtraining in Subjects the Uſe of their natural Right of contracting Marriage, and the Act of withholding the Right or of countermanding the Obligation eſſential to the Marriage Contract) in the legal Eſtabliſhment of Marriage.—And, *Thirdly*, this *Intention* of the Civil Society is declared, under ſuitable

Circum-

Circumſtances, by its eſtabliſhing Marriage *with the Sanction of abſolute Nullity.*

Here it may be proper to conſider, as diſtinctly as our propoſed Brevity will admit of and the preſent Occaſion requires, the genuine Force of Obligation in all Civil Laws; and how and in what Meaſure that Force is exerted, agreeably to the *Intention* of the Civil Legiſlature, in the great Diverſity of their Kinds and peculiar Qualities. That Civil Laws, when they are rightly made, that is, when they are limited, in their Matter, to the proper Sphere of their Activity, and fitly ordered to attain the legitimate End of Government, the Good of the Community, have an *internal* or moral Effect upon the Minds of Subjects, or do oblige their Conſciences *; you will hardly in Serioufneſs and cool Reflection deny: though under the Perſon of a Diſputant, and for Argument's Sake, you carry a very ſtrong Appearance of denying it †. I ſhall however,

* Leges civiles --- conſcientiam afficiunt. — Obligatio a coactione differt.—Quæ—ex obligatione facimus, illa ex *intrinſeco animi motu*, et velut *proprio judicio approbata* fieri debere intelliguntur. *Puff.* &c. iii. 4. 6.

† *The Rule of Right*, in this and *all other* Caſes, is the univerſal Law of Nature, by which *Men* and *States* ought to govern themſelves, *where the poſitive Law of God interpoſeth not*. Diſſ. p. 6.—*Beyond* which [natural Rights] if the Laws of Society go, they are *contradictory* to the natu-

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for the preſent, reſt the Matter upon the Authorities alledged in the Margin; and make no ſcruple of aſſerting, that all Civil Laws, I mean, all *rightful* Civil Laws, do create a certain Obligation in Conſcience. The Diverſity of Opinions upon the Subject has generally been owing to the Want of conſidering *to what Thing*, and *in what Meaſure*, Civil Laws oblige, agreeably to the real and certain *Intention* of the Legiſlature; and this *Intention*

ral Law. *Rev.* p. 14.—So that we muſt part with our old Diſtinction, with Regard to the *poſitive Law of Man*, which can appoint *præter* naturam multa, *contra* naturam nihil.—Lex civilis, ſays *Grotius*, quanquam nihil poteſt præcipere quod jus naturæ prohibet, aut prohibere quod præcipit, poteſt tamen naturalem libertatem circumſcribere, et vetare quod naturaliter licebat, &c. *De jure*, &c. ii. 2. 5. Notandum id quidem penes reges eſſe,—multa, quæ ſunt *extra* leges naturales, jubendo juſta, vetando injuſta facere. *Puff.* &c. viii. 1. 5. Does not the Doctor know, that moſt of the *Rights* of Authority and Property, now in being, were firſt introduced by *the Laws of Society?* And can he defend the Magiſtrate's Power to command any thing *morally indifferent*, of civil or religious Concern, without allowing human Laws to be, in certain Caſes, *the Rule of Right, by which* Men *ought to govern themſelves?* As to *States*, "generally all Laws human," ſays *Hooker*, "which are made for the ordering of *politic Societies*, be "either ſuch as eſtabliſh ſome Duty, whereunto all Men "by the Law of Reaſon did before ſtand bound, or elſe "ſuch as make that a Duty now, *which before was none.*" *Eccl. Pol.* i. p. 88.

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is diſcovered from the different Kinds and peculiar Qualities and Circumſtances of Laws.

Firſt, ſome Laws are *purely permiſſive*. They ſolely and ſimply mean either to take away, or to deny *an Action in a public Court of Judicature*, for the Puniſhment of an Offence againſt the natural Law, or for the ſtronger Enforcement of any natural Obligation *. Theſe Laws barely *permit* the Tranſgreſſion which they do not *puniſh*, and the Diſcharge of a Duty which they do not *encourage* and *aſſiſt*. In the State of Society, whenever the Civil Intereſt is not directly concerned, or whenever it cannot be ſo well conſulted by the Interpoſition of a coercive Law; the Dictates of natural Conſcience, and of Conſcience informed by the expreſs Law of God, are generally left to ſubſiſt upon their ſeparate Foundation †. The Matter of Obligation in Conſcience, created by a *permiſſive* Law, is only that no Perſon, either private or public, ſhall abridge the *Liberty*, or counteract the *Exemption*, which the Law ſecures to, or confers upon,

* Notandum id quidem penes reges eſſe, legibus naturalibus *vim juris civilis in foro humano exſerendam* addere vel demere, addita *ſanctione pœnali* vel dempta. *Puff.* &c. viii. 1. 5.

† In civitatibus ob violatas leges naturales, quibus *autoritas legis civilis data non eſt*, nemo convenitur aut punitur. *Ib.* § 1.

another *.

another *. Thus the Law merely *permits*; it neither affirms nor denies; it neither diſcharges nor aſſiſts the Obligation of a Contract *made by a Minor to pay a Sum of Money—after he comes of Age*; or the Obligation of *a Bond defective in ſome eſſential Circumſtance as to Form* †. Where Obligations in Conſcience ariſe from ſuch Acts of Contract, on which the Law has confered *an Immunity from Civil Cognizance*; I ſay, where Obligations in Conſcience really do ariſe, (which muſt appear from the Circumſtances) there it is praiſe-worthy, and more ſo becauſe not *legally* neceſſary; it is natural Honeſty and natural Juſtice to diſcharge them. And when they are diſcharged, ſuch is the *permiſſive* Genius of the Law, that it will not uſually aſſiſt to the Revocation of what is paid as a Debt, but a Debt which was *not recoverable by Law* §.

* Permiſſio proprie non actio eſt legis, ſed *actionis negatio*, niſi quatenus alium ab eo cui permittitur obligat *ne impedimentum ponat*. *Grot. de jur.* &c. i. 1. 9. Conf. *Puff.* &c. i. 6. 15.

† *Rev.* pp. 10, 1. *Enq.* p. 19.

§ Fieri natura honeſtum eſt, quanquam non vere debitum,—legata integra ſine detractione Falcidiæ præſtare, ſolvere debitum quo quis in pœnam creditoris erat liberatus, vicem beneficii rependere, *quæ omnia ceſſare faciunt condictionem indebiti*. *Grot. de jur.* &c. ii. 14. 6. *Puff.* &c. i. 4. 5.

Under the Species of permiſſive Laws falls Chap. 10, of the famous Statute 1 *J.* I. as far as it declares to what Inſtances of Marriage the Penalties there provided againſt Polygamy *ſhall not be extended.* Of the very ſame Character and Effect is the Clauſe of the Marriage Act, in which it is enacted, that **in no Caſe whatſoever ſhall any Suit or Proceeding be had in any Eccleſiaſtical Court,** in order to compel **a Celebration of any Marriage,** in facie Eccleſiæ, **by reaſon of any Contract of Matrimony whatſoever, whether** per verba de præſenti, **or** per verba de futuro.—I need not here ſpeak of a Contract of Matrimony *per verba de præſenti*, which, being made without the Qualifications required, as of Neceſſity, by the Act, will more properly fall under it's annulling Clauſes to be conſidered hereafter. The Clauſe juſt recited is *purely permiſſive* with regard to the *Precontract* of Matrimony, as that Word ſignifies, in its Propriety, *repromiſſio futurarum nuptiarum*, a mutual Promiſe or Engagement of the Parties to a *future* Marriage. Here it is not the *Intendment* of the Law to affect their Conſciences, either to the Hindrance or the Enforcement of the ſpecific Performance. They are left, in this Reſpect, to the Dictates of their own Minds, ſuggeſting to them either the

the Reality or the Meaſure of their Obligation, agreeably to the Preſcriptions of the natural Law concerning Contracts. And as the Obligation, however real, is not the Obligation *of* a Marriage, but a mutual Engagement *to* a *future* Marriage; ſo this Engagement has not the Property, peculiar to Marriage, namely, Indiſſolubility; and therefore may, like Contracts in general, for Reaſons of mutual Duty, Inclination, or Convenience, be ſatisfied or diſcharged by mutual Conſent. You can diſcern a juſt Diſtinction between a Minor's actual Alienation of his Eſtate *in præſenti*, and a Contract *de futuro* to alienate when he ſhall become of full Age *. It is Pity you did not diſcern a like Diſtinction between a Precontract of Marriage, or a Contract *de futuro* to alienate one's Perſon for Life, and an actual Marriage or *preſent* Alienation †; nor a correſpondent Diſtinction between the

* A Contract made by a Minor as to the Enjoyment of the Eſtate *in præſenti* is null;—but I ſee no Reaſon why a Contract *de futuro*—will not bind, I mean in Conſcience. *Rev.* pp. 10, 1. Qui—de futuro ſic dicit, Cras dabo, cras donabo; aperte ſignificat ſe jam *non dediſſe*. Puff. &c. iii. 5. 8.

† There is eſſentially no Difference between a Precontract and Marriage; a Precontract importing that the Parties *do*, and *from thenceforth* will, hold themſelves as Man and Wife. *Enq.* p. 19.

Force of the Clauſe above recited *permiſſive* with reſpect to a *Precontract*, and the Force of the Clauſes of the Act *annulling* actual, clandeſtine, *Marriages*. The Effect of the *permiſſive* Clauſe is *Nullity in Law* under an *Obligation in Conſcience*, if the Circumſtances of the Contract ſo require; the Effect of the *annulling* Clauſes is *abſolute Nullity*. By ſaying, that the Effect of the permiſſive Clauſe is *Nullity in Law* of a Precontract, under a poſſible Obligation in Conſcience; I mean, it is *Nullity in Law*, only in a *certain* Reſpect; namely, as the Clauſe takes away one ſingle Species of Action or *Proceeding*, *in order to compel a Celebration of the Marriage* in facie Eccleſiæ; *in order to* ſatisfy the Engagement by a ſpecific Performance; which Engagement may ſtill obtain a *legal* Effect of *another* Kind, and that by Proviſions of the legal Conſtitution ſtill remaining in their antient, undiminiſhed Force.—Should you now aſk, of what Uſe is ſuch a *permiſſive* Clauſe? I anſwer, of the ſame Uſe, which you aſſign for the Law incapacitating the Minor to paſs away his Eſtate *. It is to *prevent* Precontracts made

* If it be aſked, of what Uſe then are ſuch Laws? I anſwer, to *prevent* ſuch Contracts: And they do it effectually: For who ventures his Money when the Law will give him no Security? *Rev.* p. 11.

under the undue Circumſtances of Minority, Conſtraint, Deception, or unlawful Commerce. And is it not, in this View, a very ſeaſonable Security of the Minor's Liberty, and a ſovereign Preſervative of the *public Virtue* *, for which you may have ſhewn a becoming Zeal in your three Pieces; however you have been miſtaken in projecting the Means of its Improvement?

A-kin to *permiſſive* Laws, in their *Want of Civil Effect*, are thoſe which direct by Command or Prohibition but yet have not the Enforcement of a poſitive Penalty. I ſpeak not of thoſe Caſes, where the Penalty of Tranſgreſſion is not explicitely declared, but the Tranſgreſſion is puniſhable in the Way of Indictment for Contempt, and at the Diſcretion of the Magiſtrate. There are Laws, though *Puffendorf* indeed ſeems ſometimes to expreſs a different Opinion †, which are enforced by no penal Sanction either ſtated or diſcretionary: And theſe are called by Civilians *imperfect* Laws, as appearing to want one of the eſſen-

* I hope the offering my Aſſiſtance will not be thought foreign to my Profeſſion, conſidering how much the *public Virtue* may be concerned in it. *Ib.* p. 48.

† Civiles leges pœnam in violatores ſemper habent conjunctam, dum vel expreſſe deſignant genus multæ aut ſupplicii, vel, eo non definito, idem arbitrio judicis legumque executoris relictum innuunt.—Supervacuum eſt dicere, *Hoc fac*, ſi præterea nihil ſequatur. *Puff.* &c. i. 6. 14.

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tial Qualifications of Law, its Power to oblige, that is, to *compel* Obedience *. But neither are theſe Laws deſtitute of all Power of Obligation. They oblige the Conſcience. Their Obligation is ſuſtained *pudore et comitate*, by the *Virtue* and *Ingenuity* of thoſe upon whom it is exerted. On the ſame Account, all thoſe Virtues, Gratitude, Candour, Generoſity, general Benevolence, and ſuch like, are reckoned of *imperfect* Obligation. For the peculiar Quality of theſe Virtues is ſuch, that, though they carry an indiſputable Obligation in Conſcience, yet the Effects of them cannot be exacted from us as matter of ſtrict Right †; and what is done in Contradiction to their Maxims will be *criminal* in the Judgment of Conſcience, but nevertheleſs *valid* by the Law of Juſtice. The Foundation of the Difference of Duties of *perfect* and *imperfect* Obligation is laid in that *Utility*, which, when rightly underſtood, may be juſtly looked upon

* Juriſconſulti Romani quaſdam leges faciunt *imperfectas*, quibus nempe *ſanctio pœnalis deeſt*; qualis memoratur lex *Cincia*, cui nulla alia fertur adjecta clauſula quam hæc, *qui ſecus fecerit, improbe feciſſe videbitur. Ib.*

† Sciendum eſt, ſi quis quid debet, non ex *juſtitia propria*, ſed *ex virtute alia*, puta liberalitate, gratia, miſericordia, dilectione, id ſicut *in foro exigi non poteſt*, ita nec armis depoſci. *Grot. de jur.* &c. ii. 22. 16.

as

as the common *Mother* of them both *. The Meaſure of the Duties of *perfect* Obligation is the Law of *ſtrict Juſtice*; the Meaſure of thoſe of *imperfect* Obligation is, over and above, the Law of *univerſal Rectitude*: And the Obligation of the former is *perfect*, becauſe the Diſcharge of them is *neceſſary* to the *Being*; whereas the Diſcharge of the latter is conducive only to the *Well-being* and moſt flouriſhing Condition of human Society †; Juſtice, like the Bones in the human Body, extending the Proportions and ſuſtaining the Stability of the ſocial Syſtem, whilſt Equity, Benevolence, Liberality, Gratitude, and univerſal Virtue promote the freeſt Communications of beneficial Influences through every Member of that Syſtem, and perfect its Comelineſs, Health, and Happineſs. Now ſuch being the *Degrees* of Utility of the diſtinct Offices of Life, there is a correſpondent Subordination of their Force of Obligation. The Uſe of *Right* will avail in an *illiberal* or a *prodigal* Diſpenſation; but *Liberality* muſt never diſpenſe itſelf at the

*--- Utilitas *juſti* prope mater et *æqui*.

† Animi affectio ſuum cuique tribuens, atque hanc, quam dico, *ſocietatem* conjunctionis humanæ munifice et æque *tuens*, *juſtitia* dicitur; cui *adjunctæ* ſunt pietas, bonitas, liberalitas, benignitas, comitas, quæque ſunt generis ejuſdem. *Cic. de Fin.* v. 23.

Expence

Expence of another Perſon's *Right*.—To return. The Laws, of which we now ſpeak, are of that *imperfect* Obligation above deſcribed. Obedience is the Duty of *Subjects*, but an Act of Tranſgreſſion ſhall nevertheleſs avail in its moral Effects. Thus a Man muſt ordinarily have the Liberty of ſpending his own, whether to the vicious Indulgence of a diſorderly Appetite, or againſt the prudent Regulations of a ſumptuary Law. *It is*, indeed, *the Authority of the Law, not the Penalties of the Law, that binds the Conſcience* †: Yet *the Penalties of the Law* are a good Rule of judging, *how far*, in the *Intention* of the Lawgiver, *the Authority of the Law* ſhall extend to oblige the Subject in Conſcience, and where it ſhall not prevail to the Diminution of his *Right*; as we ſhall quickly ſee.

Of a Quality quite oppoſite to theſe are Laws *purely penal*; with reſpect to which I muſt obſerve, that the combined Conſideration of the *Subject Matter* of a Law, and of the *Civil Penalty* annexed to it, will ordinarily afford us the moſt perfect Criteria of its true *Intendment*, and conſequently of the Extent and Effect of its *Authority*. Where there is a *moral Indifference* of the Subject Matter of a

† *Rev.* p. 43.

Law,

Law, commanding or prohibiting under a Civil Penalty; and where the Penalty, on the other Hand, is, in the Eſtimation of the Community, of a Value equivalent to the active Obedience of the Subject; there, except in certain extreme Caſes, the *Uſe* of the Law, and conſequently the *Intention* of the Lawgiver, is equally ſatisfied by either Part of the Alternative; or, in the Words of *Grotius*, the Command or *Prohibition* of the Law will exert its whole *Force by its Penalty**. Examples of this Species of Laws are frequent in the common Buſineſſes of Life; for Inſtance, the Laws obliging a Perſon to ſerve an Office, or to pay a Fine; to labour in Perſon on the High-ways, or to pay the Hire of a Labourer; to ſerve in the Militia, or to ſend one to ſerve for him. The Conditions of theſe Laws are, that either Part may be choſen *without Fault*, and that the *Penalty* is accepted by the Community under the Notion of a *Tribute*, or valuable Conſideration for the public Service †.

* Prohibitio vim ſuam exerere poteſt per pœnam, vel expreſſam, vel arbitrariam. *Grot. de jur.* &c. ii. 5. 1.

† Obſervandum — in hoc genere legum, quæ ſanctio pœnalis videri poteſt, revera eſſe *inſtar tributi*; dum in *arbitrio ſubjectorum* relinquitur, pecuniam lege dictatam exſolvere velint, an actu aliquo abſtinere. *Puff.* &c. viii. 3. 4.

It is not, however, to be preſumed concerning any Law, that it is *purely penal*, without its expreſs Declaration to that Effect, or unleſs the ſame ſhall appear from the evident Reaſon of the Thing *. The general Intention of Laws is to direct a Conduct morally honeſt or publicly beneficial; and when ſuch is the Subject Matter of Laws, it is abſurd to conſtrue their penal Sanction, rather as adminiſtering the Means of *commuting for*, and therefore authoriſing Tranſgreſſion; than as inducing a new Force upon their native Obligation in Conſcience. This is *Puffendorf's* Obſervation upon the noted Caſe of the wild *Roman* Youth, who enquiring of the *Prætor*, what pecuniary Mulct was to be paid for an Act of Battery, depoſited the Money, and committed the Outrage upon the Magiſtrate himſelf †. Others have been as extravagant in our Days, acting as if they thought, that a Diſcharge of the legal Penalty might be the Purchaſe of a Licence for a determined Meaſure of inculpa-

* Niſi expreſſe in obligatione hæc alicui ſit *libertas conceſſa*, ut aut faciat quid, aut licentiam diverſum faciendi certa multa redimat, pœna haudquidquam a crimine purum iſtum præſtiterit. *Ib.* iv. 2. 23.

† Leges regulariter id tantum per pœnam intendunt, ut cives a *peccatis* abſterreantur.—Leges *ſuper injuriis* non ſolent eo modo ferri, ut *licentia injuriam* alteri inferendi *certa pecunia redimatur*. *Ib.* viii. 3. 4.

ble

ble Indulgence in prophane Curſing and Swearing. Now, on the other Hand, it may be affirmed with a great deal of Truth, that, next to the moral Character or public Utility of the Subject Matter of Laws, the moſt rational Rule of ſtating the particular Degree of *Streſs*, which the Legiſlature lays upon them, and conſequently of defining the true Extent of their Obligation; is the Greatneſs and Quality of the Civil Penalties enforcing them *. Accordingly the public Occaſions require, at different Times, different Degrees of Puniſhment for the very ſame Actions; and moreover theſe Puniſhments to be meaſured by Rules different from thoſe, according to which Puniſhments, in a moral Conſideration, and therefore in the divine Conſideration, uſually do proceed †. There is indeed another Rule,

* Maxime conſervanda eſt ea [lex,] quæ *diligentiſſime* ſancta eſt. *Cic. de Inv.* ii. 49.

† A Law there is mentioned amongſt the *Grecians*,— that he which, being overcome with Drink, did then ſtrike any Man, ſhould ſuffer Puniſhment double as much as if he had done the ſame Thing being ſober. No Man could ever have thought this *reaſonable*, that had intended thereby only to puniſh the Injury committed, *according to the Gravity of the Fact*: For who knoweth not, that Harm *adviſedly* done, is *naturally* leſs pardonable, and therefore worthy of ſharper Puniſhment? But — it was for their *public Good*, where ſuch Diſorder was grown,

and that a very obvious one, of collecting the Mind of the Legiſlature, concerning the Extent of the Subject's Obligation intended by any particular Law; and that is from the expreſs Declaration, or the Words of the Law itſelf. As when, for Inſtance, the Law teſtifies an Intention to **prevent** what it prohibits; and that on Account of the **great Miſchiefs and Inconveniences,** which **have ariſen from** it.

It is hardly needful to make the Application of what has been alledged upon this Head to the particular Caſe of the late Marriage Act; in order to prove, that it is not a *purely penal* Law with regard to the ſeveral Inſtances of *prohibited* Marriage. The Law itſelf is expreſs in declaring its true Deſign. The public Utility; nay, the abſolute Neceſſity of the eſtabliſhed Solemnities in making and publiſhing the Marriage Contract, is a Principle allowed on both Sides; and the Penalties appointed for every Party in Tranſgreſſion and Confederacy to defeat the true Deſign of the Legiſlature, are ſuch as are neither to be exempted from your invidious Aggravations, nor to leave the leaſt Uncertainty, what that Deſign is. Can the Law then, I do not ſay, upon

to frame a *poſitive Law* for Remedy thereof accordingly. *Hooker, Eccl. Pol.* i. 10.

any Principle of Philoſophy or Government, but upon the Principles of common Senſe, be capable of a Conſtruction, that the Subject, if he tranſgreſſes the Law, ſatisfies his Allegiance by ſubmitting to the Penalty? Can it be ſuppoſed, that, by the very *Superinduction* of this Penalty, it ſhould vacate the previous Obligation in Conſcience of, what it was manifeſtly made *in Aid* of, the old Laws, and Conſtitutions, *eſtabliſhing* regular Marriages and *prohibiting* clandeſtine ones? Not to mention, that the Admiſſion of the Penalty with all its natural Conſequences*, in the immediate Parties to the *prohibited* Contract, places the Tranſgreſſors in a Condition of Guilt, declared by the Sentence of Conſcience, and puniſhable by the Laws both of God and Man. The very Exiſtence of this Condition, the Sufferance of the Penalty, is ſo far from being to Society a Benefit equivalent to Obedience, that it rather aggravates the Guilt of the Offender by creating to Society a new Acceſſion of Injury: Juſt as the Guilt of the Party, deſervedly ſuffering Impriſonment or Death, receives a new Increaſe from the Conſideration, that Society, beſides the Miſchiefs ſhe has already ſuſtained

* Theſe are a *Diſheriſon of the whole Iſſue* of the unlawful Marriage, and, in the contracting Parties, *the Shame and Puniſhment of thoſe, who live together in a State of Fornication.* See *Diſſ.* p. 32.

from

from the Injuries for which he ſuffers, is put to the hard Neceſſity of impairing her Proſperity through the Want of his beneficial Services, or of mutilating her Conſtitution by cutting him off from her Body.

Now the Penalty in the immediate Parties to the *prohibited* Marriage Contract is the abſolute Nullity of their unlawful Act; and from the peculiar Efficacy of this Penalty ariſes a new Claſs or Order of Civil Laws, of great Account to eſtabliſh the juſt Subordination of the Offices of ſocial Life. *The State*, you obſerve *, *cannot by* ANY STRONGER ACT *forbid a Marriage than by taking from it all Civil Exiſtence.* To illuſtrate your Obſervation, *Ulpian* has diſtinguiſhed three Degrees of *Strength* or Operation in Laws. Thoſe, which are deſtitute of all penal Sanction, we have already called *imperfect* upon the ſame Authority. Others approach *nearer to* Perfection, which have the Aid of an inferior Penalty; but thoſe have the *higheſt Degree* of Perfection, which prohibit under pain of abſolute Nullity †. Indeed by a Conſtitution of the Emperor *Theodoſius* this Diſtinction of Degrees of Perfection was, in great Meaſure,

* *Diſſ.* p. 41.

† Lex irrogans pœnam, nec tamen *actum reſcindens, minus quam perfecta*; omni ſanctione pœnali deſtituta *imperfecta* dicitur. *Ulpian. Fragm.* i. 1. apud *Heinec. Elem. Jur. Civ.* P. 1. xcix.

taken

taken away; a bare Prohibition, enacted in any preceding Law, being declared ſufficient of itſelf to invalidate any Contract or Agreement between private Parties*. But *Grotius* very well obſerves, that this *nullifying* Efficacy was not inherent in the *prohibitive* Quality of the former Laws and Conſtitutions, but communicated to them by the Force of this general Law, which was a *new* Exertion of the legiſlative Authority†. It is then the ſingular Property of the Penalty of Nullity, that when it is ſuperinduced upon the bare Prohibition of a Contract, for Inſtance, a Marriage Contract, or upon a Prohibition already inforced with other Penalties; it *annihilates* in Subjects the *moral Faculty* of making the Contract, and declares the Reſolution of the Legiſlature not to *tolerate* it in the Civil Community.—Is it not

* Nullum — pactum, nullam conventionem, nullum contractum inter eos videri volumus ſubſecutum, qui contrahunt *lege contrahere prohibente*. Quod ad omnes etiam legum interpretationes tam veteres, quam novellas trahi generaliter imperamus. L. 5. C. de LL.

† Hæc intenſio non fit ex vi ſolius prohibitionis, ſed *ex vi novæ legis*, quam alii populi ſequi neceſſe non habent. *Grot. de jur.* &c. ii. 5. 16. 2. *Puffendorf*, alluding to this Paſſage, obſerves; Nemo ſeſe poteſt valide obſtringere ulterius quam ipſi eſt poteſtas. Aſt qui lege actionem prohibet, adimit ſane poteſtatem eam ſuſcipiendi et de eadem præſtanda obligationem in ſe recipiendi.—Etſi et aliquando, actu contra leges ſuſcepto, multa quidem aliqua imponatur eundem ſuſcipientibus, ipſe autem actus non reſcindatur. iii. 7. 6.

now

now pleaſant to hear you deliver this ſententious Piece of Caſuiſtry? "*Quod fieri non debet*, "*factum valet*, was the Doctrine [before the "Marriage Act;] that is, Children did ill, "and contrary to their Duty, in marrying "without their Parents Conſent; but the "Act done, it could not be reſcinded. If "you ſay, there was then *no Law* obliging "Minors not to marry without their Parents "Conſent; I deny it. The Canons were "againſt it: The Rubrics (which are Statute "Law) were againſt it: So that the Claim of "the Parents to an abſolute Negative *had all* "*the Authority that Law could give it.* All that "the late Act has done, is only adding A CIVIL "PENALTY *."—Yes, I muſt tell you, again and again, *the late Act has added* THE CIVIL PENALTY OF ABSOLUTE NULLITY. This *new* Exertion of the legiſlative *Authority* eſtabliſhes the Parent's Claim with the Sanction of *Neceſſity* to the Minor's Marriage, which former Laws had not done. And with what Pertinence can you *plead the Senſe of all our old Laws, as well ſince as before the Reforma-*

* *Rev.* p. 42. The Queſtion is, Whether a Marriage Contract made by Perſons to whom the Law has FORBIDDEN the Uſe of Marriage, is void. p. 8.---Thus the Doctor generally ſtates *the Queſtion* at the End of a Controverſy; and yet ſtates it wrong. He may make *his* a Queſtion, if he can get any Body to diſpute it with him.

tion *;

tion *; when you have not produced one Tittle from thoſe Laws to prove, that the *annulling* Clauſes of the Act are *fundamentally inconſiſtent with the Principles of Religion and Liberty* †? When the Act breaths the very ſame Spirit, and ſpeaks the very ſame Language with the former Laws, ſuperadding only a more perfect Sanction, a new Degree of *Strength* to them; which, you ſee, happened to the whole Syſtem of the *Roman* Law by one Daſh of a Pen, and yet Hiſtory does not ſay, how many *Enquiries*, *Diſſertations* and *Reviews* were excited by ſo invidious an Alteration, never, as far as appears, formally reverſed to this very Day? In a Word; *The Law may*, you agree, *in many Caſes take away the Right to contract*. Tell me then, I pray, how the *actual Exertion* of this its unqueſtionable Power, in inflicting *the Penalty*, can be otherwiſe declared than by a literal Denunciation of *Nullity* upon the prohibited Contract.

Before I cloſe the Conſideration of the Power of Laws over Marriage, it may be proper to make a Remark or two concerning the Origine of this Power, the Conditions of its Exerciſe, and the particular Caſes exempted from the Reach of its directive Influence. There is a very diſcernible Analogy between this Power

* *Rev.* p. 39. † See Poſtſcr. to *Remarks*, &c. p. 50.

in thoſe, who preſide over States, and the Authority of the Parent, conſidered as the *Maſter of his Family*, in a ſuppoſed State of Independence on the Civil Society. It is, on all Hands, allowed, that the Subjects of domeſtic Government, whether they are naturally ſo, as Children, or artificially, as Servants, are *non ſui Juris* in all thoſe Actions and Concerns of theirs, which muſt be ſubmitted to the Superior's Juriſdiction, as reſpecting the Well-being and orderly Conſtitution of his Family. It is no leſs allowed, that the Concern of their Marriage would fall under that Character and Condition of Reſtraint, on the bare Suppoſition, that the Parties in the Contract did actually continue, either of Right * or by their free Conſent, to be undivided Parts of the Superior's Family. Now the Subjects of the Civil Community are the undivided and perpetual Parts of the Family politic†. —And this Foundation of the Power of the State

* Uti pater prolem familia ejicere non debet, citra graviſſimas cauſas; ita et proles *non niſi bona cum venia patris* in aliam familiam tranſibit. *Puff.* &c. vi. 2. 13. Ut inviſam ſibi nurum *in domo ſua* toleret paterfamilias, nemo ab ipſo poſtulaverit. § 14.

† In Alluſion to this Analogy *patria* is called *major parens*, as by *Varro*, in a Paſſage particularly adapted to our Purpoſe: Si qui *patriam*, *majorem parentem*, extinguit, in eo eſt culpa; quod facit pro ſua parte is, qui ſe eunuchat,

over

over Marriage, being implied in the very Notion of Subjection and orderly Society, extends it indifferently to all Subjects, *as ſuch*; to thoſe, over whom ſhe exerciſes it by herſelf in her public Regulations of Marriage; and to thoſe, over whom ſhe exerciſes it by Delegation, in the Conſtitution of a tutelar Truſt over Minors *.

A farther Confirmation and Enlargement of what I may call the *primeval* Power of States are created from Circumſtances of great Weight both in private and politic Deliberation, which having had, in Fact, no Exiſtence in a mere State of Nature, may be juſtly looked upon as the peculiar Attributes of Civil Society. As they are *States*, the conſtitutional Order of Property in Poſſeſſion and by Inheritance, eſpecially the Order of Inheritances ſometimes eſtabliſhed to the Diminution of the Right of the preſent Poſſeſſor; and as they are *Chriſtian* States, the divinely ap-

aut *aliqua liberos producit*, i. e. as I interpret theſe laſt Words,—*from vague Luſt*. *Non.* in voce *Eunuchare*. So *Cicero* has the Expreſſion, *parricidium patriæ*. De Off. iii. 21.

* The Harmony between a *civil* and a *tutelar* Protection ariſes from the *Unity* of their End. Ut enim tutela, ſic procuratio reip. ad utilitatem eorum, qui commiſſi ſunt, non ad eorum, quibus commiſſa eſt, gerenda eſt. *Cic. de Off.* i. 25.

 pointed

pointed Limitations of Marriage and its ſingular Quality of *indiſſoluble* Obligation, conſpire all together to render it of indiſpenſable Importance to the Public and every Individual, on a ſacred and a ſecular Account, to aſcertain, by the higheſt Authority, both the ſuitable Solemnities of making the Marriage Contract, and the Sufficiency of Evidence in the Publication of it for Civil Purpoſes. Theſe Conſiderations, which are properly *adventitious*, plead ſtrongly, in particular, for the Parent's *civil*, though not for his *natural*, Right over the Child's Marriage. By the Intervention of Society, the Parent's Authority is, in this Reſpect, reduced below the Standard of Nature, in proportion as he is abridged in the Diſpoſition of his own by the Law of *Entails* or other legal Reſtraints over a diſcretionary Alienation *. It is fitting therefore, that where the juſt Influence of parental Direction has

* *Remarks*, &c. p. 35.—Si—ſuam autoritatem a liberis citra graviſſimas rationes ſpretam viderit pater, pœnæ loco familia et *hereditate excludere* immorigeros non prohibetur. *Puff.* &c. vi. 2. in fin. But this natural Privilege of the Parent, to *diſinherit* a diſobedient Child, was in ſundry Ways impaired by the *Roman* Law, particularly by the Action of *Querela inofficioſi teſtamenti*; whence the Parent's Right over the Child's Marriage was conſiſtently aſſerted by that Law, *ne cui invito ſuus heres agnaſcatur*. See *Vindication*, &c. p. 28. Not. *

ſuffered,

ſuffered, as in ſome Degree, it does ſuffer, more or leſs, in every State; it ſhould be ſupported with an adequate Supply, and, as it were, Exchange of Aid from Society in its Turn; and this Supply is provided in a Way moſt unexceptionable and familiar to human Laws *, when the Parent's natural *Authority* and *Aptitude* for the tutelar Truſt are improved into a *Right*; and *Perfection* is added to that pre-exiſtent *Obligation*, by which the Child is naturally bound, from the Regards of Gratitude, Reverence and the filial Relation itſelf, to render the Duty of a general Obſervance and Obedience to the Parent's Will. Of ſuch Operation of Law we have daily Experience, particularly in the Laws providing for the Maintenance of the Poor; whence the voluntary Diſpenſations of Beneficence put on the Form of a *Debt*, in the ſtrict Senſe of that Word, to be diſcharged, not only to the Community, which legally exacts them, but to the unhappy Objects themſelves of helpleſs Indigence and Infirmity.

On the Behalf of the Minor, a judicious and affectionate, that is, a parental Superintendence over his Marriage, *for his own particular Be-*

* Multa, quæ ex virtute quapiam, imperfectam duntaxat obligationem pariente, debentur, legibus civilibus et pactis ſanciri frequentiſſimum. *Puff.* &c. iii. 3. 8.

nefit,

neſit, proceeds, more eaſily in Society, upon the reaſonable Proſpect of ſecuring his Eſtate from the Danger of a prodigal Diſſipation, the general Foundation of the tutelar Truſt * ; and eſpecially upon the ſingular Quality of a *Chriſtian* Marriage, which infers an Obligation of his Perſon during the joint Lives of the Parties. Hence the great Importance of his not undertaking that Obligation *unadviſedly, lightly or wantonly*. And hence, we may preſume, the primitive Reception of Laws, in Favour of the Parent's Right, would have prevailed univerſally in *Chriſtian* Countries, had not the Canoniſts thought fit to introduce a new Theory of religious, or rather political Caſuiſtry, accommodated to their corrupt Doctrines, which aſſert to Matrimony the Nature of a Sacrament, and to Minors the Right of entering into religious Vows of

* In the *Roman* Law, the *prodigi*, ſuch as were *judicially* ſo declared, were ranked with the *furioſi*, who were incapable of the Management of their own Concerns. Furioſi quoque et *prodigi*, licet majores viginti quinque annis ſint, tamen *in curatione* ſunt agnatorum ex lege duodecim tabularum. *Juſt. Inſt.* i. 23. 3. And they might be incapacitated on a *public* as well as their own *private* Account ; quia reip. intereſt, ne quis re ſua male utatur. *Puff.* &c. v. 9. 5. This Reaſon is given againſt exceſſive Gaming, and is the Foundation of the Concluſion ; Igitur penes rectores civitatum eſt diſpicere, quouſque ludi permittendi ſint, aut quantæ ſummæ deponi debeant.

perpetual

perpetual Celibacy without the Parent's Conſent *. Now the joint Operation of the two Conſiderations abovementioned, the one Civil, the other Sacred, in a politic Community of Chriſtian Men, will ſo far demonſtrate the Equity of thoſe Laws, as to enable us to aſſert, "That if a new-born Infant was furniſhed "with the Aid of Reaſon, and could ſee that "he would probably plunge himſelf into "many Inconveniences by the Uſe of his na-"tural Right to contract Marriage; he would "willingly conſent to ſubmit himſelf to the "Authority of his Parents or Guardians †."— Other obvious Occaſions for the Interpoſition of Law, to hinder Marriages between particular Parties, in Aid of the poſitive Laws of God, or in View of the Public Utility ‡, in each reſpective State, or in every Situation of States with reſpect to each other; it is not my Deſign to conſider more particularly in this Place.

But when we aſſert to States any Degree of Right, *inherent* and *underived*, over Marriage: how is this conſiſtent with *the general Princi-*

* See *Stillingfleet's* Miſc. Diſc. pp. 77, 8. *Vind.* pp. 61. Not. ‡.

† Dr. *Ibbetſon's Obſervations*, &c. p. 22.

‡ Cum in familiis ſegregibus *pleræque rationes legum civilium circa matrimonia*, inter certas perſonas contrahenda, *ceſſent*, &c. *Puff.* vi. 2. 14.

ples

ples of Policy laid down by Puffendorf, Locke *and others*, viz. that *Society breaks out from the natural State, and has no more Power than what every Man yielded up to it by Conſent or Compact* * *?*—That *Society has no more Power than what every Man* did *conſent*, actually or virtually, that Society *ſhould have*; is an inconteſted Principle of true Policy, but nothing to your Purpoſe. For *every Man* is preſumed to have *conſented*, that there ſhould be veſted in Society all the Power eſſential to the Supremacy conſtituted over the Community, and expedient to attain the End of Civil Government. But if you mean, that Society has no more Power than what every Man *had originally in himſelf*, and *transfered* to the Society; this would be much to your Purpoſe, but ever was and ever will be *Hereſy*, as you Uſe the Expreſſion, both in Politics and common Senſe. " It is," ſays *Puffendorf*, " a very ſilly " Notion, that, in Morals, when a Right or " Quality is ſaid to be confered upon another, " you muſt neceſſarily ſuppoſe it to have ſome- " where a diſtinct Exiſtence before it is con- " fered †." Again, " It may and does often

* *Rev.* pp. 13, 4.

† Valde puerile eſt credere, in rebus moralibus, quando jus quodpiam, aut quævis qualitas moralis in alterum collata dicitur, neceſſum eſſe, aut eadem prius alicubi ſeparata exiſtat. *Puff.* &c. vii. 3, 4.

" happen, that a moral Quality, ſuch as is " the Right of Government, is produced in " another from the Conſent of thoſe who had " not the Quality formally pre-exiſting in " themſelves; as Voices of many Perſons " produce Harmony, which they ſeparately " had not."—" And ſince Government is the " Reſult of the Patience and Permiſſion in " Subjects of a Power of Diſpoſition over " their Liberty and Property; it is plain, that " the Seeds of Supremacy lie, as it were, " ſcattered and undiſcerned in Individuals, but " that it is promoted to Maturity by the com- " bining Force of Compacts *." Can you now pleaſe yourſelf with the Thought, that an Aſſertor of theſe Principles is *ſliding back into the Politics*, which you deſcribe as *the Politics of a hundred or two Years ago* †? Or, can it be ſuppoſed that a Writer, ſo experienced as you are, on the Subject of *Civil Go-*

* Et fieri poteſt et ſolet, ut qualitas moralis, qua claſſe imperium cenſetur, in alio producatur conſpiratione illorum, qui illud antea formaliter in ſe non habebant. Sicuti et multorum voces invicem temperatæ harmoniam producunt, quæ in ſingulis non extabat.——Et cum imperium reſultet ex non-reſiſtentia ſubjectorum, et conceſſione, ut imperans circa vires opeſque ipſorum diſponat; facile apparet, in ſingulis velut diſperſa latere ſemina ſummi imperii, quod per pacta combinantia excitatur et progerminat. *Ib.* § 5. et vi. 1. 12.

† *Rev.* p. 13.

vernment, ſhould be ſo ſhort-ſighted in your View of the ſeveral Parts and Dependencies of a political Syſtem, as not to know that you are actually aſſerting the very *Politics*, which you would appear to reject? This puts me in Mind of what *Cicero* relates of a Pair of *Roman* Pleaders, each of whom might be ſeen, to the no little Entertainment of the Court, contending with Might and Main againſt the other for thoſe very Points, which made directly for the Ruin of his own Cauſe *. That you are not diſhonoured by the Compariſon, will appear very evidently, when you reflect, that the Principles, juſt now alledged from *Puffendorf*, are thoſe Principles upon which it is irrefragably maintained, and upon which only it can be maintained, that *Society breaks out from the natural State*. They are the Principles actually oppoſed, by the rational Author himſelf, to the *Jure divino* Scheme of Government, aſſerted by *J. F. Hornius* upon no better Foundation than *the Impoſſibility of Men's conſtituting a Civil Supremacy in Another*,

* Multas horas expectavit — et ridens et ſtomachans Scævola, cum—alter plus—petebat, quam quantum lex in duodecim tabulis permiſerat; quod cum impetraſſet, cauſa caderet: alter iniquum putabat plus ſecum agi, quam quod erat in actione; neque intelligebat, ſi ita eſſet actum, litem adverſarium perditurum. *De Orat.* i, 36.

which they had not ſeparately in Themſelves *. Thus you hold it *impoſſible*, i. e. upon the Principles of the popular Syſtem, *to ſettle the Power of States without ſhewing what are natural Rights, and how, and how far, ſuch Rights were, by the Original Compact*, TRANSFERED FROM INDIVIDUALS, *and veſted in the Body politic* †. Let the ſame orthodox Lawyer anſwer you.—" It muſt be obſerved," ſays he, " that as, in natural Bodies, from the " qualified Mixture of Simples there may re- " ſult a Compoſition endowed with ſuch Qua- " lities, as were in none of the Ingredients; " ſo likewiſe may Bodies politic become the " Subject of Right, which did not ſpecifically " ſubſiſt before in any of the Individuals com- " poſing them; which Right reſides in its " proper Subject, the Head of thoſe Bodies. " So no one would affirm, that the Individu- " als have a legiſlative Power over themſelves; " yet from their joint Subjection of their Wills " to the Will of the Supreme, there ariſes a

* Operæ pretium — fuerit expendiſſe, quid ſolidi ſubſit argumentis *J. F. Hornii de Civitate. Puff.* &c. vii. 3. 3. —Inter quæ palmarium eſt, quod *cum neque ſinguli homines, neque multitudo diſſoluta majeſtatem habeant, eandem non poſſint in regem conferre.* § 4. — Ut craſſum valde ſit negare, ideo ſummum imperium *ab hominibus* [*non*] *ſumere originem*, quia in facultatibus hominis naturalibus illud non deprehendatur. *Ib.*

† *Rev.* p. 14.

" legiſlative Power preſiding over the whole " Community. In like Manner may ſubſiſt " in the Head of the Body politic the Power " of penal Coercion over the ſeveral Individu- " als, who had none of them the ſame Power " in their Separation from Community *." The Author's Hypotheſis is well known concerning the Origine of the Right of Puniſhments, that, as this is a Diſpenſation of a Superior, *as ſuch*, it cannot be pre-exiſtent to Civil Government, but is a neceſſary Appendage of it †. And is not all this very conſiſtent with his *whole Syſtem of Law* and Government, which derives the Civil Authority from the Compoſition of Individuals, and ſuppoſes it inveſted with every Power neceſſary to the legitimate End of its Inſtitution, the Good of the Community; whence every Act of Government, legiſlative or executive, which is duly exerted for the Attainment of that End ‡, derives again upon every Indivi-

* Sciendum, quemadmodum in naturalibus ex commixtione et temperatione plurium ſimplicium provenire poteſt compoſitum quid, cui tales adſint qualitates, quæ in nullo ſimplicium mixtionem ingredientium deprehenduntur; ita et corpora moralia, &c. *Puff.* &c. viii. 3. 1.

† — Jus pœnas ſumendi eſſe diverſæ naturæ a jure ſeipſum conſervandi; cumque illud exerceatur *in ſubjectos*, intelligi non poſſe quomodo jam tum in ſtatu naturali extiterit, ubi nemo alteri ſubjectus eſt. *Ib.* & § ſeqq.

‡ Mihi quidem videntur huc omnia eſſe referenda iis,

dual,

dual, in Virtue of his *Original Conſent*, a proportionable Obligation in Conſcience *?

But the Conſideration of Subſerviency to the End of the Inſtitution of Government will limit the Extent of the directive Influence of Laws, at the ſame Time that it can inforce their regular and ſalutary Preſcriptions with the indiſpenſable Obligation of Conſcience †. To aſſert to Society a Power of Legiſlation, which ſhall avail to religious Obedience, or in the Judgment of Conſcience, and ſubſiſt upon the Maxims of an equitable Policy, is to ſuppoſe an Adminiſtration of that Power conſiſtent with the natural and revealed Laws of God ‡,

qui præſunt aliis, ut ii, qui erunt eorum in imperio, ſint quam beatiſſimi. *Cic.* Ep. ad Q. F. i. 1. 8.

* Quippe cum, qui civitatem ſubierunt, omnem poteſtatem in ſe, *quantum quidem ad naturam civitatis neceſſarium erat*, in ſummos imperantes tranſtulerint. *Puff.* &c. iii. 2. in fin.

† Neque enim rex plura jure *jubere* poteſt, quam quæ cum *fine ſocietatis civilis* inſtitutæ congruunt, aut congruere judicantur. *Ib.* vii. 7. 11.—Dicto illi, *qui pœnas ſuo arbitrio jure ſumit, jure omnes cogit ad omnia, quæ ipſe vult*; limitatio eſt addenda *ex fine civitatum*, ut ſc. ſummum imperium habens non alia velle poſſe intelligatur, quam in quibus ſana ratio *aliquam convenientiam ad iſtum finem* invenire poteſt. *Ib.* 4. 3.

‡ Moderatori reip. *beata* civium *vita* propoſita eſt; ut opibus firma, copiis locuples, gloria ampla, *virtute honeſta* ſit. *Cic.* Ep. ad Att. viii. 11.

with

with the Conditions of the Marriage Inſtitution required by thoſe Laws reſpectively, and with the Virtue, the Order, and the Happineſs of the Civil Community.——This Part of our Debate indeed might have been ſpared, had you ſtrictly adhered to your ſeeming Intention of *not entering into thoſe Caſes, which ſuperſede common Rules* *. This is no more than the Juſtice, which is due to every human Law; for no Law, for general Uſe, was ever yet invented by the Wit of Man, which would anſwer every Occaſion of its Subject Matter, and never be *ſuperſeded* by extraordinary Contingencies †. But ſince you have thought fit to place here the main Strength of your Reaſoning againſt the Clauſe of the Law reſpecting Minors, I will briefly conſider the Caſes of extraordinary Contingency, which can *ſuperſede* the general Obligation of an active Obedience to human Laws; nay, ſometimes to the poſitive Laws of God himſelf ‡. Theſe are otherwiſe called Caſes of *Neceſſity*. A *moral* Neceſſity *ſuperſedes* the Obligation of all

* *Rev.* p. 47.

† Generales —leges interpretatione benigna ita accipiendæ ſunt, ut caſus ſummæ neceſſitatis excludant. *Grot. de jur.* &c. iii. 23. 5. 3.

‡ Leges etiam Dei quædam, quanquam generaliter prolatæ, tacitam habent exceptionem ſummæ neceſſitatis. *Ib.* i. 4. 7.

human

human Laws *abſolutely* and in *all* Caſes. The *natural* Neceſſities of private Perſons *ſuperſede* it, in thoſe Caſes only, where they are not over-ruled by the *public* Neceſſity *.

Suppoſe then *Chriſtians* living under a *Nero*, or Tyrant heathen Emperor, who ſhould appoint, in the Celebration of Marriage, the Uſe of ſinful and idolatrous Ceremonies; and that under the Pain of Nullity: What? May not they enter into a private Marriage?—I anſwer without Heſitation; They may enter into ſuch Marriage. For—*Non hæc in fœdera.*—Can it be ſuppoſed, that, in ſtipulating a Compliance with the Laws of Society, they did not ſecure to themſelves the Exception of a *moral* Neceſſity? Or, which is the ſame Thing, that they made a Renunciation of all the Laws of Nature, and of all the Laws of God? There is a Deciſion of irreſiſtible Evidence and univerſal Application, *Acts* v. 29. *We ought to obey God, rather than Men* †.—

* Non nego a lege etiam humana quoſdam virtutis actus poſſe præcipi ſub certo mortis periculo, ut *de ſtatione non deſerenda.* lb. § 2.

† The ſame Rule was laid down by Moraliſts, but with far leſs Advantage of Enforcement, upon other than *religious* Principles. Eſt appetitio quædam principatus, ut nemini *parere* animus bene a natura informatus velit, niſi præcipienti, aut docenti, aut *utilitatis cauſa juſte et legitime imperanti.* Cic. de Off. i. 4.

Nay,

Nay, I may go farther, in aſſerting, concerning the ſame Chriſtians, that, except in ſome uncommon Exigencies of Society, they did not wave their Privilege of a *natural* Neceſſity. Suppoſe the heathen Magiſtrate ſhould publicly prohibit under Nullity every Contract of Purchaſe, which is not made at the Staple. Reaſons of public Utility might extend his Commiſſion ſo far, in which Caſe the internal Obligation of the Subject would be unqueſtionable. Suppoſe farther a perſecuting Spirit ſhould make an Addition to the Law, that no Victuals ſhould be purchaſed at the Staple, but what had been conſecrated to idolatrous Uſes, in order to be made the general Teſt of religious Profeſſions: — What? Might not the Chriſtian Subject, under a determined Perſuaſion of the Unlawfulneſs of *eating Things offered to Idols* *, ſupply himſelf with *the Neceſſaries of Life* by making a clandeſtine Bargain? And would not the Contract be both juſtifiably made, and available in Conſcience, notwithſtanding its legal Nullity?

For the better Illuſtration of the Subject, I have conſidered the Caſes of each Kind of Neceſſity, as they ariſe from the Inſtances of immoral, oppreſſive, and perſecuting Laws.

* 1 *Cor.* viii. 1, &c.

But

But ſuch is the allowed Obligation in Conſcience of even an erroneous Perſuaſion of Religion; ſo immenſe and unforeſeen is the Variety of Situations and Circumſtances of Individuals in the State of Society; that Laws the moſt righteous, the moſt equal and publicly beneficial; Laws introduced and approved by the univerſal Conſent of Mankind, and that for the moſt valuable and univerſally deſirable End, the neceſſary Preſervation of Life and Property; theſe Laws are yet ſubject to the common Imperfections of all poſitive Laws, and muſt admit of a benign Interpretation, in Favour of Individuals, under Circumſtances of Extremity, whether natural or religious. Now in theſe extreme Caſes, ſo far as Neceſſity does really extend to their *inward* Juſtification in tranſgreſſing the Law, there is *a temporary Ceſſation of their* * *legal Relation to Society*; juſt as when a Perſon is obliged to execute his own Quarrel *ſe defendendo*, at the Expence of the Life of an unjuſt Aggreſſor, there is *a temporary Ceſſation of his Relation* to

* I ſay, *Legal*; for there is a *natural* Relation to Society, which cannot *ceaſe*, or be ſuſpended, in any Caſe whatſoever. Man is eſſentially *ſocial*, as having a *natural Appetite* to Society; but then it is not an Appetite altogether to *Civil* Society. Ἄνθρωπος — τῇ φύσει συνδυαστικὸν μᾶλλον ἢ πολιτικόν. *Ariſtot. Eth. Nic.* viii. 12.

Civil Judicature *. Yet *the Ceſſation* is *partial*, ſuſpending only the Obligation *of Obedience* to Society's poſitive Inſtitutions and Laws: And the *Ceſſation* is *temporary*, as *Society muſt be permitted its eſſential Right of Cognizance in the laſt Reſort*; even of the Act of the Subject authoriſed by all Laws human and divine. But in the Concern of the univerſal Law of Property, Civil Laws cannot, with equal Propriety and Safety, previouſly *authoriſe*, or rather *excuſe* Tranſgreſſion; leſt by eſtabliſhing a Plea of *real* Neceſſity, they ſhould encourage *falſe* Pretenſions, *to the Diſſolution of good Government, and to the Violation of private Right* †. Here Civil Judicature muſt indiſpenſably exerciſe its Right of Cognizance of every Treſpaſs; however it may be *ſanctified* in Conſcience by a Neceſſity, which neither Induſtry can remove, nor a ſeaſonable Benevolence relieves. As exactly parallel to ſuch Inſtances of Extremity I conſidered the Caſe of a Marriage Contract, *which an unfeigned Neceſſity entitles to a temporary Exemption from*

* *Ceſſat*— judicium *momentanee*, aut continue. Momentanee ceſſat, ubi expectari judex non poteſt ſine certo periculo aut damno. *Grot. de jur.* &c. i. 3. 2.

† Satius — erat a paucis etiam juſtam excuſationem non accipi, quam ab omnibus aliquam tentari. *Senec. de Benef.* vii. 16. *Vindication*, &c. p. 55.

the

the Civil Law of Marriage *. Nor, after all your Exceptions to my *Reſolution of the Caſe*, can I yet ſee how it materially differs from your own, where you emphatically decide, that the Party *tranſgreſſing the Law, is bound by his Allegiance to ſubmit to the Penalty; but the Contract will hold him in Conſcience* †.

You are ſuppoſing the Caſe of a *moral* Neceſſity, in which a Minor, for the Preſervation of his Chaſtity, may be obliged to enter into a Marriage publicly prohibited and diſallowed. For the Reſolution of this Caſe we need not to deviate into the By-paths of caſuiſtical Subtlety or polemic Chicane. It matters not, whether the Incapacity of complying with the legal Forms ariſes from an unreaſonable Scruple of Religion, or from the like unreaſonable Will of a Parent; provided it is a *real* Incapacity, under as *real* and unfeigned a Want of the Gift of Continency. Then, and then only, are Chriſtian Parties in a private Marriage, which the Law has annulled, *Man and Wife before God*; on Condition, however, that *before God* they contract the Bond of *perpetual Fidelity*; and on Condition that they are ſo juſt to Society, as to contract it *according to Law*, as ſoon as the Incapacity is removed; *ſubmitting to the Penalty* inflicted by

* *Vindication*, &c. pp. 55, 6. † *Rev.* pp. 47, 8.

the Law, or accepting the Mitigation of Rigour afforded by the Act or conſtitutional Order of Society, which muſt be Judge of the Circumſtances either pleading Neceſſity or ſolliciting Relief, as well as of what it ought to admit of in Conſideration of its own Convenience and Well-being.

But as it is not a Privilege, peculiar to the Minor, that his *Right* of Marriage is *unalienable*; ſo neither is he privileged in being exempted from the Diſcipline and Obligations of that Chaſtity, which he means to ſecure, in a Caſe of certain Extremity, by the legally prohibited Uſe of his Right. The Validity of the Plea of Neceſſity muſt be the Reſult of a barely poſſible indeed, but very extraordinary Situation of Parties under the Conduct of a moderate Law, or a parental Direction; conſidering eſpecially that Chaſtity is a Virtue, like her Siſter-Virtues of Temperance, acquirable by all Men and neceſſary to every Condition of Life. Accordingly it is evinced from common Experience, and the Senſe of Mankind; it is ſuppoſed by the Laws of God, and by the Conſtitutions of all civilized Nations, that the Appetite of Marriage is ſo far ſubject to Will, as, in the ordinary Courſe of Things, to be capable of the Government both of private Diſcretion and the Laws of the Land: And where theſe Laws

can appoint Regulations of Marriage, between Parties in Minority, or otherwiſe, and actually *do* appoint them with the declared Sanction of Nullity; there the Parties in unlawful Marriage are not only criminal in their Oppoſition to a rightful Authority, but they uſurp a Right, or rather the *Uſe* and *Exerciſe* of a Right, over which Society has a diſcretionary Superintendence; and therefore they do not only juſtly ſuffer the Civil Penalty of Tranſgreſſion, which in the State of Society muſt often be the Portion of Innocence itſelf; but their unlawful Act of Contract does not carry in Conſcience *the Obligation of a Marriage Contract*.

The Foundation of this Concluſion being a *Defect of Right* in the Parties to make the *unlawful* Contract; it follows that the Minor's actual and preſent Alienation of his Perſon in Marriage, as well as his actual and preſent Alienation of his Eſtate by a proper Inſtrument, is *ipſo facto* null; though made only *the Day before he comes of Age* *. But *can Laws fix the Time when it may be fit that Perſons ſhould marry* †? *Fix the Time* when Celibacy will be juſtifiable, or not, according to the Law of God? They *cannot* fix a Time, which ſhall be ſuited to every particular Perſon, in

* See *Rev.* p. 9. † *Ib.* p. 23.

every

every particular Circumſtance or State. But is the *Time* of Marriage for that Reaſon an incompetent Subject of Laws? Is that an incompetent Subject of Laws concerning Marriage, which is the general Subject of all human Laws; a Subject incapable of a *preciſe Definition* in Quantity and Degree, accommodated to *all* the Exigencies of the Matter or Parties concerned *? Should you argue; if the Laws can fix the Time of Marriage at Twenty-one: Why not at Twenty-five? Why not at Thirty? Why not at Forty years of Age?—My Anſwer is,

——*Uſus ſenſuſque repugnant.*
—*Cadis eluſus ratione ruentis Acervi.*

* Quod honeſtum dicimus, pro materiæ diverſitate, modo (ut ita dicam) in puncto conſiſtit, — modo liberius habet ſpatium;—ferme quomodo ab hoc *eſſe* ad hoc *non eſſe* ſtatim fit tranſitus, at inter aliter adverſa, ut album et nigrum, reperire eſt aliquid interpoſitum, ſive mixtum, ſive reductum utrinque. Et *in hoc poſteriori genere maxime occupari ſolent leges* tum divinæ, tum humanæ, &c. *Grot. de jure*, &c. i. 2. 1. 3. Leges—ſatis habent id quod *plerumque* accidit reſpicere, ut aiebat Theophraſtus, quo et illud Catonis pertinet: *Nulla lex ſatis commoda eſt: id modo quæritur, ſi majori parti et in ſumma prodeſt. Ib.* 4. 3. Now the Proportion required by *Cato* will be vaſtly exceeded, when we conſider, in Favour of the Law reſpecting Minors, "that "there are infinitely more Children, who in the Heat "and Folly of Youth, will marry improperly, than "there are Fathers, who will oppoſe reaſonable Matches." See *Baile's* Dict. in *Pienne*. Not. H.

You

You uſe a Species of Argument invented to perplex, not to aſcertain any Matter of Debate; particularly deluſive in moral Subjects, the Subjects of Civil Intercourſe and the daily Buſineſſes of Life. Are not the Vices of Intemperance, of Drunkenneſs and Gluttony, or other Extravagance, ſubject to Civil Animadverſion and the Cognizance of Law? But can you preciſely ſettle the Boundaries of thoſe Vices, for univerſal Practice and Execution; *always* as to the very *Quality* of the Things abuſed to unreaſonable Gratification*; but *ever* as to the *Quantity*, the Number of Morſels, for Inſtance, or the Number of Glaſſes, which may be innocently taken by every ſingle Perſon, and which ſhall not be exceeded without a criminal Miſconduct or with legal Impunity? Now I will undertake to diſcredit the Laws, provided in moſt Countries for the Reſtraint and Puniſhment of theſe and ſuch like Offences againſt the Rule of perſonal Virtue, with all the Mi-

* Illud planum eſt, ſub legibus comprehendi, non ſolum quæ ad juſtitiam proprie dictam pertinent,—ſed et quæ ad alias virtutes ſpectant;—qua ratione leges contra ebrietatem et alias intemperantiæ ſpecies —ferri poſſunt et ſolent. Huc pertinet lex Zaleuci: *Si quis Locrenſium ægrotans* vinum merum *bibiſſet*, niſi jubente medico, *etiamſi ad priſtinam valitudinem rediiſſet, mors ei ſupplicium erat conſtitutum. Puff.* &c. i. 6. 4.

nuteneſſes

nuteneſſes of a long exploded Sophiſtry, which compoſe the main Subſtance of your Proof againſt the Practicableneſs or Expediency of the Clauſe annulling the Minor's Marriage made without the Parent's Conſent.

I have endeavoured, in the Courſe of the Argument, to aſſert a Civil Power of enacting this and the other annulling Clauſes of the Act, as the genuine Reſult of the Principles of free Policy, which derives all the Force of Laws from the original Compoſition and Conſent of Individuals in the firſt Formation and Conſtitution of the Civil Authority. The celebrated Patron of this political Syſtem does not admit it as a neceſſary Conſequence of his fundamental Poſition, that after the Conſtitution of that Authority is once fully eſtabliſhed by free Conſent, *nothing ought to be impoſed* by it *as a Law, but what may be reſolved into the Subject's Conſent* *, either expreſsly or preſumptively given to the particular Matter of the Law †. For if, for Inſtance, the Matter of the Law ſhould happen, in any Part, to be of a *penal* Quality; *Puniſhment* is, in its Nature, the Object of *Averſion*, and muſt

* *Diſſ.* p. 30.

† Non abſurdum eſt, meo conſenſu poteſtatem aliquam conſtitui, quæ poſtea actus quoſdam in me invitum queat exercere. Etſi quod in eam poteſtatem ipſe conſenſerim, faciat, ut queri non poſſim, ſi iſta deinceps in me vires ſuas exſerat. *Puff.* &c. viii. 3. 5.

be

be inflicted *againſt* the Tranſgreſſor's *Conſent* *; which is the Reaſon alledged by him, why the criminal Party is not in Juſtice obliged to deliver in an Information againſt himſelf, nor ſubmit himſelf, without Force, to the Execution of a juſt Sentence; though *Socrates* would not eſcape, when he innocently might, the Execution of an iniquitous one, from the Dictates of a more than ordinary, and, in the View of Juſtice, more than neceſſary, Magnanimity and Charity †. I have no Occaſion to enter into the Diſcuſſion of a Principle, which the Subject in Queſtion by no Means requires. Laws, and Uſages, not exactly correſponding with the Theory of perfect Rectitude, do ſometimes obtain; nor is it always wrong, in the main, that they ſhould obtain, from a compaſſionate Senſe of Diſtreſs in the calamitous, however guilty, Party; and from the Indulgence of Candour due to the irreſiſtible Power of Self-love. I doubt not, the ſame Power of Self-love might carry the Parties in

* Pœna ſignificat aliquid, quod invito eſt imponendum, et voluntatis averſionem ab illa involvit. *Ib.* § 4.

† Hoc conſequitur, quemadmodum quis, ubi damnum a ſe datum ſarcivit, haud quidquam ſeipſum deferre tenetur, quo pœna a legibus ſtatuta in ipſum decernatur: ita ob eandem rationem negatione, occultatione, aut per fugam iſti ſeſe ſubducere citra ullius obligationis violationem licere. — Quæ —Socrates diſputat cum Crito fugam e carcere ſuaſiſſet,--- magnanimitatis dictata ſunt. *Ib.*

irregular Marriages, under the actual Feeling of the Inconveniences and Incapacities, which they have brought upon themſelves and their Poſterity; to complain of Hardſhips from a Law which had been the Occaſion, though the accidental Occaſion, of their Sufferings: Notwithſtanding the ſame Parties might very reaſonably *conſent*, and are, therefore, very reaſonably preſumed to *have conſented*, to the ſpecial, to the unfavourable and *penal* Contents of the Law; would they view it with the Eye of Community, and, abſtractedly from their own particular Caſe, conſider its Uſefulneſs to the Virtue, the Order, and the Happineſs of Society *, as well as its real Foundation in the uncontroverted Principles of that Juſtice, which muſt never be violated, as maintaining the very Being of Society itſelf.

I conclude with refering it to your ſecond

* There is an equal Force and Propriety in Doctor *Warburton's* Deſcription of "the late ſalutary Law, ſolely "calculated for the Support and Ornament of Society; by "which the juſt Rights and Authority of Parents are vin-"dicated; the Peace and Harmony of Families preſerved; "the irregular Appetites of Youth reſtrained; and the "worſt and baſeſt Kind of Seduction encountred and de-"feated;" and that by its *rendering null and void all pretended Marriages, not ſolemnized as the wiſdom of our antient Conſtitution directs.* Serm. on the Marr. Union. p. 111.

Con-

Conſideration, whether, in order to expoſe the Inconcluſiveneſs of *your* Method of arguing, the moſt fallacious of any, by Compariſon, it was not pertinent to obſerve to you, " That, " in the Inſtance of Marriage, a Subject of " Civil Community is underſtood to have con- " ſented to a Limitation of his *natural Liberty* " *of Acting*; but he cannot, in like Manner, " be underſtood to have conſented to a Li- " mitation of his *natural and neceſſary Power* " *of Thinking* *; in Conformity to the Ap- " pointments of public Wiſdom. So that a " Man cannot be underſtood as having reſerv- " ed to himſelf his natural Right to contract " Marriage, *in the ſame unlimited Extent*, as " he may, and indeed *muſt*, be underſtood as " having reſerved to himſelf his natural Right " to chuſe his Religion, and to worſhip God " according to his own Judgment and Con-

* Here the *Right* and the *Uſe* of the Right are neceſſarily *inſeparable* from each other. It is otherwiſe in innumerable Inſtances of *private* Right. So; Uſusfructus a proprietate *ſeparationem recipit*; idque pluribus modis accidit, &c. *Juſt. Inſt.* ii. 4. 2. So; Dominium, quod favore infantium — introductum eſt, ſtat intra actum primum, nec ad actum ſecundum---poteſt pertingere; id eſt, ad *habendi*, non ad *per ſe utendi* jus pertinet. *Grot. de jur.* ii. 3. 6. So; " The Law ſuppoſes the deciſive *Right* of contracting " Marriage to lie" in the Parties; " it only reſtrains the " *Uſe* and *Exerciſe* of this Right." Dr. *Ibbetſon's Obſerv.* pp. 3, 4.

" ſcience. But to avail yourſelf of a Compa-
" riſon [as ſtated by you] between the Caſes
" of a Religion publicly eſtabliſhed [with
" pecuniary and perſecuting Mulcts,] and of a
" Law of Marriage publicly eſtabliſhed [with
" the Sanction of Nullity ;] you muſt ſhew,
" that the exacted Payment of *fifty Shillings a*
" *Year* * is as *proper* a Means of rectifying
" Error in diſſenting from the eſtabliſhed
" Worſhip, as baſtardizing the Iſſue of an il-
" legal Cohabitation of the Sexes is of correct-
" ing Licentiouſneſs: And that *Baniſhment,*
" *Confiſcation, or any other Species of Perſecu-*
" *tion* of thoſe, *who think it not reaſonable to*
" *comply with the Religion of their Country* †;
" can either be neceſſary for the Support of
" the national Religion, or, by Force of any
" Principle of good Government or natural
" Juſtice, be inflicted by the State upon
" thoſe her Subjects, who could not but re-
" ſerve to themſelves their natural Right to
" chuſe their Religion and Worſhip; and
" who entitle themſelves to an equitable ſhare
" of the common Protection, by the Practice

* How comes it to paſs, that a *Separatiſt* ſhall *not* be preſumed as *conſenting* to pay *fifty Shillings* a Year for the ſake of Public Good, and that a Minor *ſhall* be preſumed as *conſenting* to *baſtardize his Iſſue* for the Sake of the Public Good? *Diſſ.* p. 38.

† *Ib.* p. 32.

" of a religious Worſhip, which is not injuri-
" rious to the Civil Peace, and by giving to
" the State all the religious Securities of Civil
" Obedience *." I am,

SIR,

Your obedient humble Servant,

JAMES TUNSTALL.

* *Vindication*, &c. pp. 46, 7.

ERRATUM.

P. 36. *l.* 24. *dele the latter* are.

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